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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LAURA DODSON, Plaintiff and Appellant, v. IRVING POMERANTZ & ASSOCIATES, et al., Defendants and Respondents.	B195289 (Los Angeles County Super. Ct. No. BC350327)

APPEAL from orders of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed in part and reversed in part and remanded.

Law Office of Leslie S. McAfee and Leslie S. McAfee for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole and Susan S. Baker for Defendants and Respondents.

An individual hired an accountant to prepare her tax returns. She ultimately terminated the services of the accountant prior to the completion of any returns. The accountant sued the individual for his hourly fee for the time spent working on her file. This suit was voluntarily dismissed on the day set for trial. The individual then brought a malicious prosecution against the accountant and his attorney. The accountant and attorney prevailed on an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion, and the individual's malicious prosecution action was dismissed. The accountant and the attorney were awarded their attorney fees as prevailing movants on the anti-SLAPP motion. The individual appeals. We affirm the orders in favor of the attorney, but reverse the orders in favor of the accountant.

FACTUAL AND PROCEDURAL BACKGROUND

The parties vastly disagree on their interpretation of events leading to this appeal; the confusion is magnified by certain misstatements of counsel. We therefore set forth the facts and procedural history derived from the record on appeal, acknowledging the parties' differing interpretations of the facts, and identifying key misstatements.

1. *Dodson Retains, and Ultimately Terminates, Pomerantz*

Plaintiff Laura Dodson runs a small business out of her home. In February 2002,[1]

[1] Dodson's complaint in this action alleges that she retained Pomerantz "[o]n or about November 12, 2001." Her subsequently-filed declaration indicates the date of retention was in February 2002, a date confirmed by Pomerantz's billing sheets.

she retained the services of Irwin Pomerantz,[2] a CPA, to prepare her federal and state tax returns for the years 1999, 2000, and 2001.[3] The retention agreement was initially an oral one. In June 2002, after Pomerantz had been working on Dodson's returns for over four months, he sent Dodson an engagement letter. The engagement letter indicates that its intent is "to minimize and to, hopefully, avoid any possibility of future misunderstandings relative to our services, fees, etc." The letter wrongly identifies the scope of work as preparing Dodson's 2001 tax returns. The letter states that the returns will be prepared "from information which you have or will furnish to us. We will make no audit or other verification of the data you submit, although we may ask you for clarification of some of the information." The letter goes on to state, "Our work in connection with the preparation of your income tax returns does not include any procedures designed to discover defalcations or other irregularities, should any exist. We will render such accounting and bookkeeping assistance as we find necessary for preparation of the income tax returns only." The letter states that Pomerantz's fees "will be based upon the amount of time required at our current billing rates, plus out-of-pocket

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[2] We use "Pomerantz" to refer to defendants and respondents Irwin Pomerantz & Associations, LLP, and Irwin Pomerantz.

[3] Dodson's complaint in this action alleges only that she retained Pomerantz to file her tax returns for the year 2002. This appears to be a typographical error; the bulk of the complaint indicates that Pomerantz was retained to file Dodson's tax returns for the year 2001. Typographical error aside, the complaint alleges only that Pomerantz was retained to prepare tax returns for a single year, not three years. Dodson's later declaration asserts that Pomerantz was retained to prepare three years of returns; Pomerantz's declaration is in accord. Indeed, Pomerantz asserts that he was retained to prepare Dodson's 1998 returns as well.

expenses," but does not indicate the current rates. Dodson signed the letter on July 12, 2002, and returned it.

When Dodson retained Pomerantz in February 2002, she provided Pomerantz with her financial data on computer disk, formatted in "Quickbooks," a small business accounting program. She also provided some hard copies of her financial information. According to Dodson, Pomerantz immediately reviewed the documents and told her that they appeared to be well-organized and that he could easily prepare her tax returns from the data. Pomerantz agrees that he had initially told Dodson her records appeared informative and useable, although he states that he later discovered that they were not, and so told Dodson.

In April 2002, Pomerantz filed a request for an automatic extension to file Dodson's 2001 federal return; Dodson was informed of this. In August 2002, Pomerantz filed a second request for an extension to file Dodson's 2001 federal return;[4] Dodson was again informed.

On September 10, 2002, Pomerantz sent Dodson a bill for $3,015.24, "for professional services rendered" from February 6, 2002 to June 30, 2002. Upon receipt of the bill, which Dodson characterized as "excessive and unconscionable," Dodson

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[4] When Pomerantz told Dodson of the first extension request, he indicated that she would be granted an automatic six month extension to October 15, 2002. When Pomerantz told Dodson of the second extension request, he confirmed that she had already been granted an extension to October 15, 2002. The second request submitted to the IRS, however, requested an extension until *October 15, 2002*. There is no explanation in the record as to why Pomerantz sought a second extension to the date to which an extension had already been obtained.

terminated Pomerantz's services and requested return of her documents.[5] Pomerantz attempted to settle the dispute regarding his bill and returned Dodson's documents.[6]

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[5] In Pomerantz's declaration, he represents that the timing of the events was reversed. That is, he states that Dodson first directed him to stop working on September 30, 2002, and that he "immediately complied and sent Dodson a closing statement in the amount of $3,015.24 for the work completed to date." Pomerantz's declaration is completely contradicted on this point by the exhibits attached to the declaration. Pomerantz's bill is dated September 10, 2002. Dodson's termination letter of September 30, 2002 references the bill of September 10, 2002 by both its date and its amount. It is apparent that the bill preceded the termination. We find it significant, however, that Pomerantz describes the bill as a closing statement for work performed to date, as this would indicate that Pomerantz *did no work on Dodson's returns after June 30, 2002* (with the apparent exception of seeking the second, seemingly duplicative, extension). Indeed, there is no evidence in the record that Pomerantz ever submitted a bill to Dodson (or wrote off charges) for the period from July 1, 2002 through September 30, 2002. Pomerantz's itemized billing statement for the pre-June 30, 2002 period indicates no work at all in June 2002 except for the receipt of a fax on June 12 and a phone call to Dodson on June 18 regarding "billing rate and training on [Q]uickbooks." In other words, a close examination of the record indicates that *all* of the work allegedly performed by Pomerantz for Dodson was done *before* Pomerantz sent Dodson the June 13, 2002 engagement letter, and that he did virtually nothing on her behalf for the four months prior to his termination.

[6] Pomerantz did not immediately return Dodson's documents. Dodson's termination letter of September 30, 2002, stated, "Please arrange for your office staff to call me as soon as the papers I left with you are ready for pick up." Pomerantz did not do so. Instead, on October 16, 2002, Pomerantz responded to Dodson's termination letter by requesting Dodson to come to his office and confer regarding the bill. His letter stated, in part, "Laura, at the conclusion of our meeting we will reach some accord on our billings, [and] will return to you whatever we might be holding that is your property . . . ." We note that, upon a written demand for a client's records, a licensed accountant "shall not retain such records. Unpaid fees do not constitute justification for retention of client records." (Cal. Code Regs., tit. 16, § 68.) We are disturbed by the implied suggestion in Pomerantz's letter that Dodson was required to come to his office and reach an agreement on the outstanding bill before Pomerantz would return Dodson's documents. Dodson apparently rejected Pomerantz's request to meet and instead sent a representative to Pomerantz's office to retrieve her files the following week; Pomerantz properly turned over the records.

On Thursday, October 3, 2002, Dodson retained another CPA, Thomas Hopp, to prepare her tax returns for 1999, 2000, and 2001. Dodson gave Hopp "the exact same materials" she had previously given Pomerantz. On Monday, October 7, 2002, Hopp presented Dodson with her completed state and federal tax returns for each of the three years. He "had no difficulty in preparing and completing" the returns with the information provided by Dodson. Hopp's total charge for the preparation of the returns was $600.

2. *Pomerantz Sues Dodson*

Pomerantz's billing dispute was not settled and Pomerantz ultimately retained defendant and respondent Attorney Harold Margulies to bring suit against Dodson. On December 4, 2004, Attorney Margulies filed the suit ("the fee action") as a limited jurisdiction civil matter. The complaint alleged causes of action for: (1) open book account; (2) account stated; and (3) work, labor and services. In each cause of action, Pomerantz sought the unpaid amount of $3,015.24. The open book account cause of action sought attorney's fees,[7] pursuant to Civil Code section 1717.5.[8] The remaining two causes of action sought 10% interest from October 10, 2002.

Discovery proceeded in the fee action and the case proceeded to trial. On

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[7] In Dodson's brief on appeal, her counsel argues that the fee action must have been maliciously prosecuted because "[n]o reasonable attorney would commence much less bring to trial a case worth only $3,000 particularly if attorney's fees were not recoverable." Attorney's fees, although limited by statute, were, in fact, sought.

[8] Civil Code section 1717.5 limits the amount of attorney fees to an amount not exceeding 25% of the principal obligation. In this case, that amount would be $753.81.

August 8, 2005, the day set for trial, Pomerantz voluntarily dismissed the fee action with prejudice. The request for dismissal, signed by Attorney Margulies, states, "Each party to bear their own costs and attorney fees." Dodson would later assert that she did not agree to this provision.

3. *Dodson Sues Pomerantz and Attorney Margulies*

Dodson was represented in the fee action by Attorney Jack Willis. Dodson paid Attorney Willis over $11,000 in attorney fees and costs to defend the fee action. On April 7, 2006, represented by new counsel, Attorney Leslie McAfee, Dodson brought the instant action against Pomerantz and Attorney Margulies. Dodson's complaint alleges two causes of action: (1) malicious prosecution of the fee action, against both defendants; and (2) fraud, against Pomerantz only. Dodson's complaint was based on the theory that Pomerantz's promise to prepare her tax returns was made without the intention to perform. Instead, Dodson alleges, Pomerantz had a plan to create false bills for work and services not performed, and to pressure her into paying "phantom and excessive charges for unnecessary work, work that was neither performed nor completed." Dodson alleges that the fee action was a maliciously prosecuted sham – a fact which should have been apparent to Attorney Margulies upon learning that Hopp had been able to prepare her tax returns based on the same information she had given Pomerantz, in three business days, for $600.

Attorney Margulies demurred to the complaint. That demurrer is not part of the record on appeal. On July 14, 2006, Pomerantz demurred to the complaint as well; his demurrer addressed both causes of action. The demurrers were ultimately taken off

calendar by the trial court and never heard.

4. *The Anti-SLAPP Motion*

On July 28, 2006, Attorney Margulies filed an anti-SLAPP motion. As Attorney Margulies had not been named in the fraud cause of action, his anti-SLAPP motion addressed only the malicious prosecution cause action. Pomerantz did not file his own anti-SLAPP motion; instead, he filed a joinder in the motion filed by Attorney Margulies.

"Adjudication of an anti-SLAPP motion involves a two-part process. First, the moving party bears the burden of establishing a prima facie showing that the plaintiff's cause of action does, in fact, arise from the defendant's free speech or petition activity. Second, if the moving defendant meets that burden then the burden shifts to the plaintiff to establish a probability of prevailing. In order to establish such probability the plaintiff is required to make a prima facie showing of facts which would, if proven at trial, support a judgment in plaintiff's favor. [Citation.] 'The burden on the plaintiff is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment.' [Citation.]" (*Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1270.)

It would not be disputed by Dodson that a malicious prosecution cause of action is subject to the provisions of the anti-SLAPP law. Therefore, the key issue was whether Dodson could establish a prima facie case of malicious prosecution. Attorney Margulies argued that she could not. His anti-SLAPP motion was supported by his own declaration, a declaration from Pomerantz, correspondence between Pomerantz and Dodson, and certain documents from the fee action.

The evidence submitted in support of the anti-SLAPP motion permits the following view of events. Dodson retained Pomerantz because she was attempting to refinance her property. Her lender would not consider a loan without copies of her tax returns for the past 3 or 4 years – but Dodson had not filed returns for those years. She therefore hired Pomerantz to prepare these returns. Although Dodson's data initially appeared useable, on closer examination, Pomerantz discovered that it was error-filled and unusable. Pomerantz and his firm therefore found it necessary to "re-do[] Dodson's books and records." When Pomerantz filed the first extension request, he informed Dodson in writing that he was required to do so because she had not provided him with sufficient information to prepare her return. The second extension request, which was copied to Dodson in August 2002, indicated that it was necessary because "all required information has not been received to file an[] accurate and complete return."

Dodson terminated Pomerantz in September, 2002. Thereafter, Pomerantz attempted, on several occasions, to settle the dispute regarding his outstanding bill, for one-half the amount. Dodson refused. Having received no compensation for the substantial bookkeeping services he had provided to render Dodson's data useable, Pomerantz hired Attorney Margulies. Attorney Margulies reviewed Pomerantz's entire file on Dodson, including all correspondence and billing statements. He interviewed Pomerantz and one of Pomerantz's employees who had worked on Dodson's file. He then filed the fee action. On August 8, 2005, the day set for trial, the parties and their counsel engaged in settlement negotiations. Dodson agreed to settle the fee action for a voluntary dismissal with prejudice and a mutual waiver of costs and fees. The trial

judge was informed of the settlement[9] and directed Attorney Margulies to prepare a request for voluntary dismissal, which was filed. Both Pomerantz and Attorney Margulies had filed the fee action based on a good faith belief that Dodson had not paid Pomerantz's legitimately-incurred fees, and not out of any malice or ill-will toward Dodson.

5. *The Opposition to the Anti-SLAPP Motion*

Dodson opposed the anti-SLAPP motion. Her view of the facts was directed toward establishing a prima facie case of malicious prosecution. Dodson's opposition was supported by her declaration, a declaration of Attorney Willis, a declaration of Hopp,[10] certain correspondence, and documents from the underlying fee action. As will be discussed at length below, the trial court found the declaration of Attorney Willis to be wholly inadmissible, and excluded it. Therefore, we discuss that declaration separately.

Without Attorney Willis's declaration, Dodson's evidence supports the following view of the facts. When Dodson retained Pomerantz in February 2002, Pomerantz was aware that time was of the essence as she needed the tax returns quickly to consummate a refinance of her property. Pomerantz reviewed the documents she had provided and indicated that it would be "no problem" to complete the necessary returns. Dodson did not hear back from Pomerantz until April 11, 2002, when she received a copy of the first

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[9] This was not performed on the record.

[10] Hopp's declaration was unsigned. A signed version was presented at the hearing on the anti-SLAPP motion.

extension request. Concerned that the cover letter indicated that she had not provided sufficient information for the preparation of her tax returns, she called Pomerantz's office. She was informed that the cover letter was a form letter and that the office simply had not yet completed her returns. She reasserted the necessity of timely obtaining the returns for her refinance. When Dodson next received the June 2002 engagement letter, she noted that it "was full of inaccuracies and omissions: it did not list the correct scope of work nor did it provide any information of charges or fees." Dodson nonetheless signed the letter because she was told that it was necessary for Pomerantz to continue the work.

In September 2002, Dodson received a bill from Pomerantz indicating charges in excess of $1,700 for "Bookkeeping Services," and over $1,100 for "Tax Services." Dodson had never retained Pomerantz to provide bookkeeping services. "No work had ever been shown to [her], sent to [her], or provided to [her] to demonstrate Pomerantz had done anything related to the scope of work for which he had been retained – to prepare and file [her] 1999, 2000 and 2001 tax returns." She terminated Pomerantz's services on September 30, 2002. Three days later, she presented to Hopp the exact same materials that she had previously provided Pomerantz. Hopp completed the 1999, 2000, and 2001 returns in a few days for $600. Although Pomerantz claimed to have performed over $3000 in services for Dodson, she never received a single piece of work product from him. When she was sued by Pomerantz, she attempted, at Attorney Willis's urging, to settle the dispute for a low amount; her offers were rejected. On the day trial was to commence, Pomerantz unilaterally and voluntarily dismissed the lawsuit. She never

agreed to a mutual settlement agreement; never agreed to waive costs or attorney fees; and never agreed to waive any future claims for malicious prosecution.

Attorney Willis's declaration confirms Dodson's declaration in several respects. He also indicates that he informed Attorney Margulies of the meritlessness of the fee action repeatedly throughout the pendency of the action.[11] He states that Attorney Margulies "never filed a list of evidence or witnesses he was going to present at trial. In fact, there was no evidence from [Attorney] Margulies'[s] clients that would support any of the allegations in the complaint. In contrast, on the day of trial, I appeared with an expert whose testimony would have supported my client's defenses. [Attorney] Margulies had no expert at trial (nor had he ever indicated he had at any time retained or expected to call any expert witnesses). I also advised [Attorney] Margulies on the day of trial that on that day, my expert opined that Mr. Pomerantz'[s] billing records and claims

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[11] There is a problem with the chronology in Attorney Willis's declaration. The fee action was filed on December 2, 2004. Attorney Willis's declaration indicates that he was retained by Dodson to defend the fee action. Yet he indicates that upon his review of the complaint, he sent Attorney Margulies a letter on February 10, *2004*. The attached letter is, in fact, dated February 10, 2004, and encloses a proposed settlement check from Dodson also dated February 10, 2004. Attorney Margulies rejected the offer with a letter dated February 18, 2004. Either Attorney Willis, Attorney Margulies, and Dodson *all* wrote the wrong year, or, contrary to the chronology set forth by Attorney Willis, this correspondence occurred some ten months *prior* to the filing of the fee action. This is plausible. Pomerantz retained Attorney Margulies as early as December 20, 2003, at which time Attorney Margulies wrote Dodson a collection letter. On February 2, 2004, Pomerantz wrote Dodson, making a final attempt to settle the dispute before authorizing Attorney Margulies to sue. It is likely that Dodson *then* retained Attorney Willis, and Attorney Willis wrote Attorney Margulies with the small settlement offer on February 10, 2004. If this is the case, Attorney Willis's statement that he sent the February 10, 2004 letter to Attorney Margulies "[u]pon [his] review of the complaint" is wholly mistaken.

constituted a fraud." According to Attorney Willis, Attorney Margulies conceded that he could not put on a case, and advised Attorney Willis that he would be filing a request for dismissal. There was no agreement to waive costs and, in fact, Attorney Willis expressly told Attorney Margulies that Dodson reserved all her rights. The dismissal was not the result of any agreement, but simply "to mitigate the damages [Dodson] would continue to incur and based on the expert's expected testimony including his testimony pertaining to fraud."

As stated above, Attorney Willis's declaration was ultimately ruled inadmissible. The declaration was submitted by Attorney McAfee as part of the continuously paginated opposition to the anti-SLAPP motion. Thus, the declaration began on page 20 of the opposition. It continued without incident through the bottom of page 21, where paragraph 9 of the declaration was set forth in full. Thereafter, there was no page 22. The next page was page 23, the signature page, which began with 2 lines of a carryover paragraph (apparently paragraph 10), although the first part of the paragraph was nowhere to be seen.

6. *The Reply and Hearing on the Anti-SLAPP Motion*

On August 21, 2006, Attorney Margulies filed his reply in support of the anti-SLAPP motion. He also filed objections to some of the evidence filed in opposition to the motion. With respect to Attorney Willis's declaration, Attorney Margulies raised certain evidentiary objections. He also argued that paragraph 10 should be stricken on the basis that "[n]o paragraph 10 exists." He specifically argued that the apparent carryover lines from paragraph 10 on page 23 must be stricken.

The hearing on the anti-SLAPP motion was held on August 28, 2006. Attorney McAfee was not in attendance on behalf of Dodson. Instead, Attorney Anthony O'Farrill specially appeared for Dodson. Attorney O'Farrill was unfamiliar with the record in several respects. Indeed, at one point, Attorney O'Farrill represented to the court that Dodson *had not signed the engagement letter*, even though the letter appeared to be signed by Dodson and she admitted signing it in her declaration.[12] As to the problem with the Attorney Willis declaration, Attorney O'Farrill was similarly unprepared. The court asked Attorney O'Farrill "what happened to paragraph 10" in the Attorney Willis declaration. Attorney O'Farrill responded that "it was just a typographical error. There is no paragraph 10." The court then pointed out the two carryover lines at the top of page 23, indicating the presence of a partial paragraph 10, and the absence of the rest of it. When the court again asked about the remainder of the declaration, Attorney O'Farrill responded, "Your honor, I'm []specially appearing on behalf of [Attorney McAfee]. I was not involved with the preparation of the opposition. I – (pause). I could file a complete declaration, I imagine, by the – [interruption] – end of today." The court did not accept Attorney O'Farrill's offer.

The reporter's transcript of the hearing on the anti-SLAPP motion covers 59 pages and reflects the trial court's detailed inquiry into the elements of a malicious prosecution

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[12] When this was pointed out to Attorney O'Farrill, he replied that he had simply assumed it was the sort of engagement letter that sets forth a fee structure and is not signed by the client. The court admonished Attorney O'Farrill for making a factual assertion so carelessly without knowing the facts.

action and whether Dodson could establish a prima facie case. There were two key points on which the trial court attempted to obtain clarification of Dodson's position from Attorney O'Farrill. First, the court asked whether Dodson was contending Pomerantz *did not perform work at all*, or simply performed unnecessary work. Although Dodson's complaint had alleged that Pomerantz "complete[ly] and utter[ly] fail[ed] to perform any work," Attorney O'Farrill did not dispute that Pomerantz did, in fact, perform work. Instead, Attorney O'Farrill argued that the work done by Pomerantz was outside the scope of his retainer. Attorney O'Farrill emphasized that Pomerantz had been retained only to prepare the tax returns, and that none of his services rendered were useable in the preparation of the returns. Second, the court inquired as to Dodson's contention regarding the particular *point in time* at which Attorney Margulies should have known that Pomerantz's claim was baseless, given the fact that Pomerantz showed Attorney Margulies bills for services apparently rendered. Attorney O'Farrill responded that Attorney Margulies dismissed the action before trial because Attorney Margulies knew that Dodson's expert[13] would testify that none of Pomerantz's work was useable in the preparation of the tax returns.

Based on these characterizations, the trial court granted the anti-SLAPP motion, on the basis that Dodson did not establish a probability of prevailing on her malicious

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[13] Attorney O'Farrill stated the expert in question was Hopp. There is nothing in the record – and certainly nothing in Hopp's declaration – indicating that he was the trial expert for Dodson in the fee action. Hopp's declaration focuses exclusively on his own preparation of Dodson's tax returns.

prosecution cause of action – specifically, that she did not present prima facie evidence that the fee action had been filed or maintained without probable cause. With respect to the *filing* of Pomerantz's suit for unpaid fees, the court concluded that Dodson agreed that Pomerantz had performed work for the fees, but argued only that he was not entitled to those fees because he did not prepare any tax returns. The court found that the engagement letter defeated this argument. As the signed engagement letter indicated that Pomerantz would render bookkeeping services believed necessary to prepare the returns, and that Dodson would be billed hourly for these services, the court found probable cause existed as a matter of law for pursuit of the fee action for unpaid bookkeeping fees. As for maintenance of the action, the court concluded that Dodson took the position that probable cause disappeared when Attorney Margulies was informed of the expected testimony of Dodson's expert. Since the action was *dismissed* at this time, there was no evidence that defendants continued to pursue the action after probable cause had disappeared.[14]

In the course of its ruling, the court disregarded Attorney Willis's declaration in its entirety, because the gap in pagination and the partial paragraph 10 raised doubts regarding its legitimacy. The court noted that the problem had been raised in the reply papers, and that no errata or corrected declaration had been submitted to the court prior to the hearing. After the court had ruled on the anti-SLAPP motion, Attorney O'Farrill

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[14] The court did note, however, that Dodson had presented prima facie evidence that the fee action had been terminated in her favor, presumably because her declaration denied any settlement.

asked if the court would instead take the matter under submission and allow him to file a corrected declaration that afternoon. The court stated that it had already ruled.

Upon granting the anti-SLAPP motion, the court took the demurrers off calendar. No counsel reminded the court that the fraud cause of action had not been addressed by the anti-SLAPP motion. On September 19, 2006, the court signed an order granting the anti-SLAPP motion, and dismissing Dodson's action. The order also indicated that Pomerantz and Attorney Margulies would be entitled to their attorney fees upon motion.

7. *The Attorney Fees Motions*

On September 29, 2006, Attorney Margulies filed his motion for attorney fees, seeking a total of $12,532.50 in attorney fees. Attorney Margulies's motion was supported by the declaration of his attorney, who presented an itemized breakdown of the hours spent on the case. Attorney Margulies sought *all* of his counsel's fees for defending the case; he did not limit his claim to his pursuit of the anti-SLAPP motion. Moreover, some of the line-items in his attorney's declarations indicated that certain blocks of time were spent doing research attributable to *both* the anti-SLAPP motion and the demurrer. That same day, Pomerantz filed a similar motion, seeking $15,956.50 in attorney fees; his motion was also supported by a declaration of counsel itemizing the hours worked. Pomerantz also sought all of his counsel's attorney fees; we note, however, that Pomerantz had not filed an anti-SLAPP motion, and had only joined the motion filed by Attorney Margulies.

Dodson agreed that defendants were entitled to their attorney fees as prevailing parties on the anti-SLAPP motion, but argued that they were entitled to their fees related

solely to that motion, not their defense of the entire action. At the hearing, the trial court agreed with Dodson, and indicated that it would review the itemizations of attorney fees presented by defendants' counsel and eliminate the fees that were not related to the anti-SLAPP motion. Attorney Margulies was awarded $10,815 in attorney fees (compared to the $12,532.50 he sought), and Pomerantz was awarded $13,540 in fees (compared to the $15,956.50 sought). This order was made on November 13, 2006.[15]

8. *The Motion for Relief Under Code of Civil Procedure section 473*

On October 25, 2006, prior to the hearing on attorney fees, but nearly two months after the hearing on the anti-SLAPP motion,[16] Dodson filed the complete declaration of

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[15] The hearing was not reported. The parties have proceeded on appeal by means of a settled statement of that hearing. Dodson's brief on appeal, prepared by Attorney McAfee, states that, at the hearing *on the anti-SLAPP motion*, the court initially stated that no opposition had been received or read by the court, at which point counsel provided a copy of the opposition. This is incorrect; the record citation for this proposition refers to the settled statement for the hearing on the *attorney fees* motions, not the anti-SLAPP motion.

[16] Dodson's brief on appeal states, "Made aware of [the error in the Attorney Willis declaration] by the opposition, Dodson filed (and served) the complete [Attorney] Willis declaration on October 25, 2006, eighteen (18) days before the hearing. [Attorney] Margulies filed no supplemental objections to the complete [Attorney] Willis declaration, nor did counsel even reference the complete [Attorney] Willis declaration at the time of the hearing." The brief goes on to state, "[T]he 'confusion' articulated by the court was more a function of the court's not having read or considered the filed original [Attorney] Willis declaration and not considering the explanation for why, at first glance, the declarations appeared to be 'different.' Certainly, counsel's objection to the missing paragraph 10 was well placed initially, but was rendered completely moot by the filing of the full and complete, original declaration. [¶] Any initial concerns about the 'missing' paragraph 10 should have been discarded weeks before the hearing actually took place." This can only be characterized as a complete and utter misstatement of the record on appeal. The complete Attorney Willis declaration was filed on October 25, 2006, nearly *two months* after the August 28, 2006 hearing on the anti-SLAPP motion to which it

Attorney Willis, concurrent with the filing of a motion under Code of Civil Procedure section 473, subdivision (b) to set aside the order of dismissal.[17] In his motion to set aside the dismissal, Attorney McAfee represented that the problems with the originally-filed version of the Attorney Willis declaration were the result of pagination errors which occurred because Attorney McAfee had attached only the *signature page* of Attorney Willis's copy of the declaration to the opposition, rather than Attorney Willis's entire

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pertained. (The hearing it was served "18 days before" was the hearing on defendants' motions for attorney fees, to which it was wholly irrelevant.) Indeed, Attorney McAfee filed the complete Attorney Willis declaration in conjunction with a request for relief from the dismissal due to Attorney McAfee's *own fault* in failing to file the complete declaration prior to the hearing on the anti-SLAPP motion. The representation to the contrary in Dodson's opening brief is baseless. The further statement, in the brief, that there was a "lack of any comment by movants' counsel once they received the complete declaration," is similarly baseless, as the clerk's transcript on appeal contains Pomerantz's written "objections to plaintiff's subsequent filing of 'complete and original declaration of [Attorney] Willis.' "

[17] As we will discuss below, the Code of Civil Procedure section 473 motion was ultimately properly denied on procedural grounds. As such, we need not dwell on the substance of the motion. However, we note that the motion begins with a four page statement of facts, beginning with the assertion, in bold type, "**These facts are undisputed.**" Far from being undisputed, several of the facts are asserted *for the very first time* in the motion, and have no cited evidentiary support. For example, the motion states that, prior to the trial of the fee action, Dodson's expert was prepared to testify that "no work or services were ever performed" by Pomerantz. Attorney Willis's declaration does not indicate the expert was prepared to testify that Pomerantz had done no work; he states that the expert would testify only that Pomerantz's bills constituted fraud. Somewhat bizarrely, the motion also states that, prior to trial in the fee action, "When [Attorney] Margulies asked what it would take to resolve this case short of trial, [Attorney] Willis replied, 'A dismissal.' After discussing [Attorney] Willis'[s] demand with his client, [Attorney] Margulies indicated his clients had agreed." Dodson never produced *any* evidence of this exchange. In fact, this assertion appears to undermine Attorney Willis's declaration that Attorney Margulies *unilaterally and voluntarily* chose to dismiss the case with prejudice after learning of the expected testimony of Dodson's expert.

copy. When Attorney McAfee attached Attorney Willis's signature page to the rest of his declaration, the omissions were not spotted.[18] The substance of the declaration submitted, however, was the substance of the declaration signed by Attorney Willis.[19] Attorney McAfee argued that the dismissal should be set aside and the declaration of Attorney Willis considered in a re-determination of the anti-SLAPP motion.

On November 17, 2006, Dodson filed a notice of appeal, appealing from the order granting the anti-SLAPP motion and the order granting defendants their attorney fees. The hearing on Dodson's motion for relief under Code of Civil Procedure section 473 had been set for November 27, 2006. At the hearing, the court questioned its jurisdiction to hear the motion, as a notice of appeal had been filed. As the trial court loses jurisdiction upon the "perfecting" of an appeal, and Dodson had filed a timely notice of

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[18] Attorney McAfee stated, "I did not review carefully the Opposition upon receipt of [Attorney Willis's] declaration because I was pre-occupied with preparing for [other pending] cases and because the work product of . . . my paralegal was so exemplary."

[19] We here note, although it was not identified by any of the parties or the trial court, that there is, in fact, a small substantive *difference* between the Attorney Willis declaration originally submitted to the court and the "complete and original" Attorney Willis declaration later submitted by Attorney McAfee. On February 10, 2004, Attorney Willis submitted a letter to Attorney Margulies offering to settle the underlying dispute for a small amount. In paragraph 4 of Attorney Willis's declaration submitted with the opposition to the anti-SLAPP motion, Attorney Willis states that he offered to settle the matter for "$10.00." Paragraph 4 of the "complete and original" declaration later submitted indicates that the offer was "for $150.00." While the $10 figure is clearly a typographical error, it is apparent that: (1) Attorney Willis corrected the error before signing the declaration; and (2) Attorney McAfee failed to incorporate the correction into the version of the declaration originally submitted to the court. Attorney McAfee's assertions before the trial court and this court that the declaration filed was exactly the declaration as signed (excepting for pagination errors) are therefore untrue.

appeal, the court believed it lacked jurisdiction. Dodson argued that the trial court had not yet lost jurisdiction because the record on appeal had not been designated or prepared, so the appeal was not yet "perfected." When asked for authority for this proposition, Attorney McAfee conceded that he had not researched the issue. The court concluded that the notice of appeal deprived it of jurisdiction and therefore declined to further hear Dodson's motion.[20]

CONTENTIONS ON APPEAL

On appeal, Dodson challenges the order granting the anti-SLAPP motion, the order granting attorney fees, and the order denying her motion for relief under Code of Civil Procedure section 473. As to the anti-SLAPP motion, Dodson contends the trial court erred in concluding she had failed to introduce prima facie evidence that the fee action was pursued without probable cause. In the course of this argument, Dodson argues that the court erred in excluding the Attorney Willis declaration in its entirety. As to the order granting attorney fees, Dodson agrees that the court properly ruled that defendants were entitled to only those fees incurred in connection with the anti-SLAPP

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[20] On December 1, 2006, Dodson sought an order shortening time to hear a motion for reconsideration of the above ruling on the basis of authority that an appeal is not, in fact, perfected until the record is complete. The request was denied. In Dodson's brief on appeal, it is stated that there was an ex parte hearing *to shorten time to hear the motion for relief under Code of Civil Procedure section 473*, which was denied at an unreported hearing, on the basis that the court lacked jurisdiction after the notice of appeal had been filed. Dodson states that the actual motion for relief was therefore never filed. This is not correct. There was no application to shorten time to hear the Code of Civil Procedure section 473 motion; the motion was filed on October 25, 2006, heard in due course on November 27, 2006, and denied at a *reported* hearing where the court first raised the issue of its lack of jurisdiction.

motion itself (and the attorney fee motions). However, she argues that the court erred in making its determination as to the proper amount of fees, as the attorney declarations were insufficient to enable a proper allocation of fees between the anti-SLAPP motion and unrelated attorney work. As to the denial of her Code of Civil Procedure section 473 motion, Dodson contends the court erred in concluding that it lacked jurisdiction to hear the motion.

In response, defendants[21] argue that the anti-SLAPP dismissal must be affirmed because Dodson fails to address the elements of favorable termination and malice – and that, in any event, Dodson has not established a prima facie case of any element of malicious prosecution. Defendants argue that their attorney fees were appropriately calculated by the trial court. Defendants do not argue that the trial court correctly declined to hear the motion for relief under Code of Civil Procedure section 473; instead, they argue that there was no *legal* basis for relief under that statute, and that the trial court therefore properly denied relief. Finally, defendants argue that Dodson cannot show a probability of prevailing on her fraud cause of action against Pomerantz.

DISCUSSION

1. *The Anti-SLAPP Motion*

"On appeal, we review the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant made its

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[21] While Pomerantz and Attorney Margulies were represented by different counsel at trial, they are jointly represented on appeal.

threshold showing the action was a SLAPP suit and whether the plaintiff established a probability of prevailing. [Citation.] 'In doing so, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." ' [Citation.] We do not weigh the credibility of the evidence or its comparative probative strength." (*Marijanovic v. Gray, York & Duffy, supra,* 137 Cal.App.4th at p. 1270.)

As it is undisputed that the anti-SLAPP law applies to malicious prosecution actions, we proceed to the second step and consider whether Dodson established a probability of prevailing on her malicious prosecution cause of action. " 'In every case, in order to establish a cause of action for malicious prosecution a plaintiff must plead and prove that the prior proceeding, commenced by or at the direction of the malicious prosecution defendant, was: (1) pursued to a legal termination favorable to the plaintiff; (2) brought without probable cause; and (3) initiated with malice.' " (*Id.* at pp. 1270-1271.)

We first consider whether the fee action proceeded to a termination favorable to Dodson. Preliminarily, we address defendants' argument that Dodson is barred from arguing that the action terminated in her favor as she did not argue the issue in her brief on appeal.[22] Dodson discussed favorable termination, albeit briefly, on page 27 of her appellate brief. The issue is therefore properly before us.

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[22] Defendants say that Dodson did not "challenge[] the trial court's order as to [this] element[]." The trial court had resolved this element in Dodson's favor; there was nothing for her to challenge.

"In order for the termination of the lawsuit to be considered 'favorable' to the malicious prosecution plaintiff, it must be reflective of the merits of the action and of the plaintiff's innocence of the misconduct alleged therein. In most cases, a voluntary unilateral dismissal is considered a termination in favor of the defendant in the underlying action." (*Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335.) "On the other hand, a resolution of the underlying litigation that leaves some doubt as to the defendant's innocence or liability is *not* a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff. Thus, a dismissal resulting from negotiation, settlement or agreement is generally not deemed a favorable termination of the proceedings. [Citations.] The purpose of a settlement is to *avoid* a determination on the merits. 'In such a case the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of defendant's guilt or innocence.' " (*Id*. at pp. 1335-1336.) "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of . . . the prosecuting party that the action would not succeed. [Citation.] If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808.)

In this case, it is undisputed that the fee action terminated by means of a voluntary dismissal with prejudice. Attorney Margulies and Pomerantz assert that this dismissal cannot constitute a termination in favor of Dodson, because the voluntary dismissal,

which included a waiver of costs, was the result of a settlement agreement. But Dodson's declaration in opposition to the anti-SLAPP motion denies this; Dodson declares in no uncertain terms that the dismissal was unilateral and voluntary on defendants' part. She states, "I have never agreed to any mutual settlement agreement with either Pomerantz or his counsel with regard[] to the [fee action]. I have never agreed to waive my attorney's fees or costs." Dodson's declaration clearly establishes a prima facie showing that the dismissal was not the result of a settlement, and therefore constituted a termination in her favor. On appeal, defendants take the position that Dodson's declaration is suspect because it is "inherently contradictory." Defendants note that, earlier in her declaration, Dodson indicates that she had attempted to settle the matter in order to avoid spending the money required to defend the case. Defendants argue that it is contradictory for Dodson to state that she made several attempts to settle, and also assert that she did *not* agree to settle for a waiver of costs prior to trial. We see no inherent contradiction. Dodson had offered to settle for $150 ten months before the suit was filed; she offered to settle for $350 shortly after the complaint had been filed and before she had filed any responsive pleading. The fact that, nearly six months later, after expending over ten thousand dollars on the defense of the action, she was no longer willing to settle for a mere waiver of costs and fees is in no way contradicted by her earlier settlement offers. Dodson's declaration that she did not consent to the dismissal is not inherently suspect, and therefore constitutes evidence of favorable termination sufficient to meet her burden in defending the anti-SLAPP motion.

We turn next to the issue of probable cause. The evaluation of probable cause requires an *objective* determination of the reasonableness of the pursuit of the underlying lawsuit. That is, whether, on the basis of the facts known to Pomerantz and Attorney Margulies, the institution and prosecution of the fee action was legally tenable. (*Marijanovic v. Gray, York & Duffy, supra,* 137 Cal.App.4th at p. 1271.) We consider whether any reasonable attorney would have thought the claim tenable. (*Ibid.*) " 'This rather lenient standard for bringing a civil action reflects "the important public policy of avoiding the chilling of novel or debatable legal claims." ' [Citation.] 'A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also aware of evidence that will weigh against the claim. Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious.' [Citation.] 'Counsel who receives interrogatory answers appearing to present a complete defense might act reasonably by going forward with the defendant's deposition in light of the possibility that the defense will, on testimonial examination, prove less than solid. The reasonableness of counsel's persistence is, of course, a question of law to be decided on a case-by-case basis . . . .' [Citation.]." (*Ibid.*)

In this case, we largely agree with the trial court's analysis of the issue of probable cause. However, we conclude the trial court erred in combining the analysis of probable cause with respect to Pomerantz with the analysis of probable cause with respect to

Attorney Margulies. The trial court concluded that, as a matter of law, Dodson could not establish that Attorney Margulies brought or maintained the fee action without probable cause. Here we agree. Prior to filing the fee action, Attorney Margulies had reviewed the following: (1) Pomerantz's bills, indicating time spent performing bookkeeping services for Dodson; (2) the signed engagement letter, by which Dodson apparently agreed to pay Pomerantz's hourly rates for bookkeeping necessary to the preparation of her returns; and (3) the two extension requests sent to Dodson, which expressly informed her that Pomerantz believed Dodson had not provided him information sufficient to prepare her returns. Combined with Attorney Margulies's interviews with Pomerantz and his employee who purportedly worked on Dodson's file, Attorney Margulies clearly had probable cause to file the fee action seeking compensation for the bookkeeping hours. Moreover, Dodson did not present any evidence that at any time prior to the dismissal of the fee action, Attorney Margulies was presented with evidence that would defeat his probable cause to maintain the action.[23] The anti-SLAPP motion was therefore properly granted with respect to Attorney Margulies.

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[23] Dodson argues that Attorney Willis repeatedly informed Attorney Margulies that the action lacked probable cause, and "outlin[ed] the lack of evidence with specificity." An unsupported representation by opposing counsel that his client is not liable is not sufficient to defeat probable cause. (*Marijanovic v. Gray, York & Duffy, supra,* 137 Cal.App.4th at p. 1272.) Even if Attorney Willis's declaration is considered on this point, the declaration states only, "Numerous times through-out the litigation and, in particular, each time discovery responses were received by Pomerantz, I commented to [Attorney] Margulies that his client had not produced any evidence of any work or services performed; that Mr. Pomerantz had no evidence to support any of the claims in his complaint and that the complaint was both frivolous and lacked any factual or evidentiary support." Such a bald assertion is insufficient to defeat probable cause,

We disagree, however, with respect to Pomerantz himself. Dodson presented evidence that: (1) Pomerantz was retained only to prepare her tax returns, and knew that time was of the essence; (2) Pomerantz told her that her documents were sufficient for the task, and told her that any suggestion to the contrary in the extension request was simply a form letter; (3) The documents were, in fact, sufficient for the task, and another CPA completed the work from those documents, in a matter of days, for $600; (4) After working on the case for *seven months*, Pomerantz had presented Dodson with *no* useable work product, and had instead presented only a bill for *five times* the amount the tax returns should have cost. This evidence supports the conclusion that, even if Pomerantz performed the bookkeeping services he claimed, the services were *outside the agreed-upon scope of the work*, and Pomerantz therefore *knew* that he could not legitimately seek payment for them. The evidence also supports the conclusion that the engagement letter does not change the result. Although, by the time of the engagement letter, Pomerantz had purportedly determined that he had to completely re-do Dodson's books and records, the engagement letter states that tax preparation, not record correction, was the purpose of the engagement, and that Pomerantz would only render those bookkeeping services necessary for the preparation of the returns. Far from

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especially in light of the evidence Attorney Margulies had in his possession. Dodson also finds it significant that Attorney Margulies apparently filed a version of the fee action prior to the fee action that was ultimately served. According to Attorney Margulies, the action was filed but ultimately dismissed because he could not effect service. Dodson suggests that this explanation is a sham and that Attorney Margulies voluntarily dismissed the first action because he knew it was baseless, and then filed the second fee action knowing it was baseless. The argument is wholly speculative; the mere fact that Attorney Margulies filed and initially dismissed the fee action means nothing.

clarifying the scope of the engagement as Pomerantz asserts it had been changed, the engagement letter instead obfuscates Pomerantz's intent to perform substantial bookkeeping services and charge Dodson for them. In short, Dodson's evidence, if believed, would support the conclusion that Pomerantz vastly overinflated his hours for a routine tax preparation matter, and spent months performing unnecessary bookkeeping tasks. Under these circumstances, Pomerantz knew his bills were a sham, and therefore lacked probable cause to sue Dodson for their payment.

Finally, we turn to the issue of malice. Again, defendants assert that Dodson waived the issue by failing to address it in her appellate brief. Again, defendants are mistaken; Dodson addressed the issue on pages 21 and 22 of her brief.[24] We therefore reach the issue on its merits. As we have already concluded Dodson failed to establish a probability of prevailing on her malicious prosecution cause of action against Attorney Margulies, we address the issue of malice with respect to Pomerantz only. " 'The malice element of the malicious prosecution tort goes to the defendant's subjective intent . . . . It is not limited to actual hostility or ill will toward the plaintiff.' [Citation.] It can exist, for example, where the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim. A lack of probable cause is a factor that

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[24] Defendants' assertion that Dodson's brief "never makes any argument" about malice is particularly baseless. We briefly quote from Dodson's brief: "The issue was whether the filing of the . . . underlying complaint was done without probable cause and with malice. There simply was no evidence (probabl[] cause) to support any claim for moneys owed for work and services. [¶] This leaves us, then, with the issue of malice. Malice is amply demonstrated by the Pomerantz letters he, himself, attaches to his declaration."

may be considered in determining if the claim was prosecuted with malice [citation], but the lack of probable cause must be supplemented by other, additional evidence. [Citation.] Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 218.)

Here, we conclude there is sufficient evidence that Pomerantz brought the fee action against Dodson with malice. We incorporate, at this point, the evidence that the action was prosecuted without probable cause; that is, that Pomerantz sued Dodson for fees he knowingly incurred outside the scope of his retainer. We note that, in October 2002, Dodson informed Pomerantz that she suffered from a debilitating skin disorder and was attempting to "reduce all stress," and in January 2003, informed Pomerantz that she was still bedridden. In October 2003, Pomerantz told Dodson that if she failed to settle the matter, he would "have to consider . . . pursuing this via Small Claims Court or via our attorney." Knowing that small claims court was an option, and that Dodson had been experiencing health problems, Pomerantz instead chose to bypass small claims court, and retained Attorney Margulies. Pomerantz then sent Dodson a settlement demand, with a note reading, "Laura, don't be a hard head and take a chance on your having to hire legal counsel and spend good money to see if you can do better than this offer, it really should not be worth it to you." We conclude this evidence is sufficient to support the conclusion that Pomerantz, knowing that he billed Dodson for work for which he had no right to recover, intentionally filed suit in civil court in order to force Dodson to settle the matter

to avoid incurring attorney's fees well in excess of the amount demanded. If believed, this constitutes malice.

In sum, we conclude the trial court did not err in granting the anti-SLAPP motion filed by Attorney Margulies.[25] However, as Dodson established a prima facie case of malicious prosecution against Pomerantz, the court erred in granting the anti-SLAPP motion to the extent he had joined it.

2. *The Motions for Attorney Fees*

Both defendants were awarded their attorney fees as prevailing defendants on the anti-SLAPP motion.[26] As we conclude Pomerantz should not have prevailed on the anti-SLAPP motion, the attorney fee award in his favor must be reversed.[27] Dodson

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[25] Our conclusion in favor of Attorney Margulies is not dependent on the trial court's decision to exclude Attorney Willis's declaration in its entirety. Nonetheless, we note that the court did not abuse its discretion (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1348, fn. 3) in excluding the declaration. The declaration as submitted to the trial court in opposition to the anti-SLAPP motion was clearly incomplete, as it lacked the initial part of paragraph 10, and appeared to be missing an entire page. The court did not abuse its discretion in concluding that these issues raised sufficient doubts as to the legitimacy of the declaration to justify its exclusion in its entirety.

[26] In their brief on appeal, defendants find it "notabl[e]" that the attorney fee award in favor of Pomerantz has already been paid, and describe the circumstances in which the fee was purportedly paid. These alleged facts are not part of the record on appeal and therefore are not properly before this court. Their inclusion in defendants' brief is improper.

[27] On remand, Dodson may seek her own attorney's fees for successfully defending the anti-SLAPP motion, should she establish Pomerantz's pursuit of the motion was frivolous or solely intended to cause unnecessary delay. (Code Civ. Proc., § 425.16, sub. (c).)

contends the attorney fee award in favor of Attorney Margulies must be reversed because Attorney Margulies failed to provide the trial court with sufficient detail in his attorney's declaration to enable the court to properly determine which fees incurred were allocable to the anti-SLAPP motion.

We review an award of attorney fees for the successful prosecution of an anti-SLAPP motion for an abuse of discretion. (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1248-1249.) The award will be affirmed in the absence of a clear showing that the trial court's decision was arbitrary or irrational, or exceeds the bounds of reason. (*Id*. at pp. 1249-1250.) Dodson has failed to meet this burden. Attorney Margulies's counsel submitted a declaration indicating the attorney time spent on the matter each day, and identifying the tasks performed on that day. Some line-items specifically identify work on the anti-SLAPP motion or demurrer; others mention legal research regarding malicious prosecution, which could conceivably be attributable to either document. As Dodson has failed to include Attorney Margulies's demurrer as part of the record on appeal, we cannot determine the extent to which he raised issues in his demurrer that were not also in his anti-SLAPP motion. The trial court, having seen both documents, was in a position to do so. The record on appeal gives us no basis on which to conclude that the trial court's decision to award Attorney Margulies $10,815 of the $12,532.50 he sought in attorney fees, rather than some lesser amount, was arbitrary, irrational, or exceeds the bounds of reason. We therefore affirm the award of attorney's fees.

3. *The Code of Civil Procedure section 473 Motion*

Dodson challenged the anti-SLAPP dismissals by means of a Code of Civil Procedure section 473 motion. The motion was not heard until after Dodson had filed her notice of appeal from the anti-SLAPP dismissals, and the trial court concluded that it therefore lacked jurisdiction to hear the motion to vacate.

Except as otherwise provided by statute, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby . . . ." (Code Civ. Proc., § 916.) It cannot be disputed that a perfected appeal of a judgment or order deprives the trial court of jurisdiction to hear a motion to vacate that judgment or order under Code of Civil Procedure section 473. (*Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1317; *Weisenburg v. Molina* (1976) 58 Cal.App.3d 478, 485-486.)

Dodson argues, however, that the mere filing of a timely notice of appeal is insufficient to "perfect" the appeal for the purposes of depriving the trial court of jurisdiction. Relying on cases which require the preparation of the appellate record in order to "perfect" an appeal for the purposes of appellate resolution (e.g. *Marshall v. Baldy* (1940) 36 Cal.App.2d 462, 463), Dodson argues that record preparation is *also* required to "perfect" an appeal for the purposes of transferring jurisdiction from the trial court to the appellate court.[28] We disagree. In *Navarro v. Lippold* (1948) 86 Cal.App.2d

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[28] Interestingly, Dodson cites *McMahon v. Superior Court* (1967) 255 Cal.App.2d 363, 364, for the proposition that an appellate court cannot resolve the appeal without the complete record, while the opinion in that case actually goes further and states that

677, 679, the court concluded that an appeal is perfected for the purposes of staying trial court jurisdiction, "when the formalities prescribed by the Rules on Appeal are complied with." In that case, the filing of a notice of appeal stayed proceedings in the trial court. (*Id*. at p. 679.) Subsequent cases have held that trial court proceedings were stayed due to the filing of notices of appeal. (E.g., *Ehret v. Congoleum Corp., supra,* 73 Cal.App.4th at pp. 1316-1317; *Weisenburg v. Molina*, *supra*, 58 Cal.App.3d at pp. 485-486.) Commentators agree that the filing of a timely notice of appeal perfects the appeal and triggers the stay. (9 Witkin, California Procedure (5th ed. 2008) Appeal, § 17; p. 78; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 7:2, p. 7-1 (rev. #1, 2007).) California Rules of Court, rule 8.244(b)(1) provides that an appellant may abandon an appeal before the record is filed. The rule states "The filing [of an abandonment] effects a dismissal of the appeal and *restores the superior court's jurisdiction*." (Emphasis added.) Obviously, this rule presumes that jurisdiction is transferred to the appellate court prior to the completion of the record.

Upon Dodson's filing of a timely notice of appeal from the anti-SLAPP dismissals, the appeal was perfected and the trial court lost jurisdiction on the matter. The court therefore did not err in declining to rule on Dodson's Code of Civil Procedure section 473 motion, as the hearing on that motion post-dated the notice of appeal.

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proceedings in the trial court are not stayed until the record is completed. The statement in that case, however, is dicta, and is contradicted by more recent authority.

4. *The Remaining Fraud Claim*

Dodson's complaint against Pomerantz alleged causes of action for malicious prosecution and fraud; Dodson's complaint against Attorney Margulies alleged malicious prosecution only. Attorney Margulies filed an anti-SLAPP motion with respect to the malicious prosecution cause of action; Pomerantz filed a joinder in that motion. There was no anti-SLAPP motion filed, heard, or ruled upon by the trial court with respect to the fraud cause of action alleged against Pomerantz. Nonetheless, the trial court entered a dismissal in favor of Pomerantz, without ever disposing of the fraud cause of action.

In their respondents' brief on appeal, defendants argue that the dismissal of the fraud cause of action must be upheld because Dodson "cannot meet her burden of showing a probability of prevailing on her claim for fraud against Pomerantz." The argument is baseless. Dodson was never required to establish a probability of prevailing on her fraud claim against Pomerantz. The fraud claim was never challenged by an anti-SLAPP motion; it was challenged only by a demurrer, which was never heard.

As we are reversing the dismissal in favor of Pomerantz, we again note that the record indicates the fraud cause of action was never addressed by the trial court. It appears that the proper course of action would be for the trial court to hear and rule upon Pomerantz's demurrer to that cause of action, and to make such orders and conduct such further proceedings as may be appropriate.

DISPOSITION

The order of dismissal in favor of Attorney Margulies and the order granting Attorney Margulies his attorney's fees are affirmed. The matter is remanded for a determination of the attorney fees to which Attorney Margulies may be entitled for successfully defending an appeal the anti-SLAPP dismissal in his favor. Attorney Margulies shall recover his costs on appeal from Dodson.

The order of dismissal in favor of Pomerantz and the order granting Pomerantz his attorney's fees are reversed. The matter is remanded for further proceedings consistent with this opinion. Dodson shall recover from Pomerantz her costs on appeal of the orders in his favor.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.